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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

RONALD M. VARNI,

Plaintiff and Appellant,

v.

MAUREEN S. TICER, as Trustee, etc.,

Defendant and Respondent.

A104268

(San Mateo County
Super. Ct. No. 96884)

Petitioner Ronald M. Varni, a beneficiary of a trust established by Eugene and Lee A. Varni, appeals after the trial court approved an accounting submitted by his half-sister Maureen S. Ticer, the trustee, and overruled his objections. We affirm.

I. BACKGROUND

Eugene and Lee A. Varni established a revocable living trust with themselves as trustees, naming as beneficiaries their four children, Ronald M. Varni, Maureen S. Ticer, Eugene J. Varni, and Jeannine M. Ibarra.¹ The trust included a subtrust for the benefit of Ronald, providing that the trustee could pay Ronald as much income as he or she deemed appropriate for his support and expend principal for his benefit, and that upon his death, his share would be distributed to the other surviving beneficiaries or their issue. Maureen became successor trustee after the death of her parents. The trust agreement allowed the

¹ Because some of the family members share the same last name, we will refer to them by their first names. We mean no disrespect by this designation.

trustee to make distributions of the property in kind, providing the distributions “need not be **pro rata** among similar interests, so long as the totals are proportionate.”

Ronald’s attorney sent a letter to Maureen in her role as trustee on March 18, 2002, asking her to provide an accounting of the trust. Ronald and Maureen corresponded through their attorneys over the next several months about the requested accounting. On June 21, 2002, Ronald filed a petition to compel Maureen to account. Maureen completed the accounting, and on July 30, 2002, petitioned the trial court for approval of the accounting. The petition indicated that Maureen had divided the remaining trust assets into four equal shares, making distributions partly in cash and partly by distributing the real estate remaining in the trust. In particular, a property on Kenry Way (the Kenry Way property) was allocated one-quarter to each beneficiary, and a property at 2106/2108 Clarice Lane (the Clarice property or the Clarice duplex) was allocated in part to Maureen and in part to Jeannine, based on its value on October 15, 2001.

Ronald objected to the accounting and requested a surcharge of the trustee and an award of attorney fees. Among his objections were the contentions that no rental income had been derived from the Kenry Way property; that Jeannine was allowed to live at 2106 Clarice, a part of the Clarice duplex, at below-market rent; and that when Maureen distributed the value of the Clarice duplex to herself and Jeannine, she did not allocate to them the property’s fair market value.

The trial court on December 18, 2002, appointed a referee to assess the accuracy of the accounting, the reasonableness of the trustee’s determination of the fair market value of real property owned by the trust, and the trustee’s duty to sell or rent one of the trust properties. The referee reported that the basic concept of the accounting was accurate and overall it was complete and met the requirements of the Probate Code;² that

² Probate Code section 16062, subdivision (a) requires a trustee to make annual accountings to a trust’s beneficiaries. Section 16063, subdivision (a) establishes requirements for accounts furnished pursuant to section 16062.

all stocks and real property were listed at proper appraisal values; that most of the trust properties that had been sold were sold for gains; that the net rental income of the Clarice duplex was correct, although one unit was rented below the market rate and the other above market rate; that the fair market value of the duplex on November 20, 2002, was \$750,000 to \$800,000;³ that the Kenry Way property should have been cleaned out and repaired within four or five months of the death of Lee A. Varni,⁴ that its rental value would have been \$2,600 to \$3,200 per month in 1999; that the property was ultimately repaired and sold for a reasonable price; and that each beneficiary received virtually the same amount. The referee recommended that the trustee prepare future accountings in a timelier manner and that they be more in line with acceptable accounting procedures.

Ronald filed a petition for an order adopting the recommendations of the referee, surcharging the trustee, charging beneficiaries with distributions, and for an award of attorney fees and costs. He asked the court to conclude that Maureen failed to collect fair market rent on 2106 Clarice, that she distributed the Clarice duplex to herself and Jeannine at a value at least \$25,000 less than its fair market value, that she failed to make the Kenry Way property a productive asset, that she failed to provide a timely accounting, and that Ronald had benefited the trust by retaining an attorney to seek and contest the accounting.

After a hearing, the trial court entered an order in favor of Maureen. The court adopted most of the referee's findings, including the findings that each beneficiary received essentially the same amount, that the net rental income for the Clarice duplex was correct, and that the fair market value of the Clarice duplex at the time of its distribution was \$750,000 to \$800,000. The trial court also accepted the referee's finding that the Kenry Way property could have been rented and the personal property contained

All further statutory references are to the Probate Code.

³ The referee later clarified that the date on which the duplex had a fair market value of \$750,000 to \$800,000 was actually October 15, 2001.

⁴ It appears Lee, the surviving trustor, died in August 1999.

in it stored, but found that Maureen had discretion as trustee to retain the Kenry Way property as a trust asset without renting it to a tenant. The court also found there was no basis for an award of attorney fees or costs. Therefore, the court approved the accounting, overruled the objections to it, and denied the requests for a surcharge to Maureen as trustee, for a charge to Jeannine, and for an award of attorney fees and costs to Ronald. This timely appeal ensued.

II. DISCUSSION

On appeal, where the decisive facts are undisputed, “we are confronted with a question of law and are not bound by the findings of the trial court.” (*Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 799.) However, to the extent the court’s findings below relied on disputed facts, we review those findings for substantial evidence. Under this standard, we must determine whether there is any substantial evidence, contradicted or uncontradicted, that will support the judgment. (*Estate of Beard* (1999) 71 Cal.App.4th 753, 778-779.)

A. Failure to Rent Kenry Way Property

Ronald contends Maureen breached her duties as trustee by leaving the Kenry Way property vacant after Lee died, rather than increasing the trust’s income by renting it out.⁵ The referee found the property should have been cleaned out and repaired within a few months of Lee’s death. The trial court accepted this finding, but concluded the trustee had discretion to retain the Kenry Way property as a trust asset, reaching this decision “after considering other factors, including the trust portfolio as a whole, the language of the trust instrument, particularly, Article 6.1(e), the significant costs required

⁵ Maureen contends that Ronald waived his right to claim a breach of fiduciary duty by not raising the issue below. We disagree. Ronald argued below that Maureen’s actions violated her duties under the Probate Code, particularly her duty of loyalty (§ 16002) and her duties to treat beneficiaries impartially (§ 16003), to avoid conflicts of interest (§ 16004), and to make trust property productive (§ 16007). On appeal, Ronald contends these violations constituted violations of Maureen’s fiduciary duties. Despite a difference in terminology, the thrust of Ronald’s argument is the same on appeal as it was below. Accordingly, we will consider his arguments on the merits.

to bring the property to a trouble-free condition, as well as the risks incident to its rental and the benefits of holding the property for likely appreciation and for the storage of the unusually large number of items of personal property of the trust estate.” Maureen concedes the trial court’s conclusion that she had discretion to retain the Kenry Way property is subject to de novo review, because it “ ‘requires a critical consideration, in a factual context, of legal principles and their underlying values.’ ” (*Harustak v. Wilkins* (2000) 84 Cal.App.4th 208, 212, italics omitted.) Here, the facts most relevant to this issue—the provisions of the trust document and Maureen’s failure to rent out the Kenry Way property—are undisputed. (See *Ghirardo v. Antonioli, supra*, 8 Cal.4th at p. 799.)

A trustee has the duty to make trust property productive. (§ 16007.) However, the trustee’s “investment and management decisions respecting individual assets and courses of action must be evaluated not in isolation, but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust.” (§ 16047, subd. (b).)

Article 6.1.e. of the trust agreement provided: “The Trustee may retain, for such time as may be deemed advisable, any property received hereunder whether or not of the character permitted by law for the investment of trust funds The Trustee shall not retain unproductive property for an unreasonable time after receipt of written request by the beneficiary entitled to the income therefrom that it be converted to productive property.” On September 23, 2002, Ronald’s attorney sent to Maureen’s attorney a written demand that she sell or rent the Kenry Way property. The property was sold in February 2003.

The referee concluded the Kenry Way property had been sold at a gain, and the record supports this conclusion. According to the accounting, the market value of the Kenry Way property on December 29, 2001, was \$455,000. On September 30, 2002, on behalf of Ronald, a broker opined that the property would sell in the range of \$570,000. On behalf of Maureen, a broker opined on October 5, 2002, that the house would sell for approximately \$550,000. A probate referee appraised the house at \$625,000 as of November 14, 2002. Maureen’s response to Ronald’s petition for a surcharge stated that

the property had been appraised by a probate referee at \$435,000 on August 10, 1999, and that it was sold for \$635,000 in February 2003.⁶

Moreover, there is evidence that the Kenry Way property needed extensive repairs before being made rentable. According to an October 2002 letter from Maureen's broker, the porch was in a hazardous condition, the kitchen had many plumbing problems, and the house needed new appliances, carpets, toilets, and paint.

We agree with the trial court that Maureen had discretion to retain the Kenry Way property as a trust asset without offering it for rental. We may not view the treatment of the Kenry Way property in isolation, but must view it in the context of the trust portfolio as a whole. (§ 16047, subd. (b).) During the period Maureen administered the trust, several pieces of real property were sold, all at gains. Although the trust did not receive rental income from the Kenry Way property, the property increased in value during the trust period and was ultimately sold at a significant gain. Viewing the treatment of the Kenry Way property in the context of the trust instrument's expectation that not all property would be productive and of the gains in the value of the trust estate and in particular of the Kenry Way property, we conclude Maureen did not violate her duty to make trust property productive when she allowed the property to increase in value without preparing and offering it for rental.

B. 2106 Clarice Rental

Ronald contends Maureen breached her duty to treat all beneficiaries impartially by charging Jeannine below-market rent on the 2106 Clarice property. (See § 16003.) According to the referee, this unit was rented to Jeannine for \$1,100 per month, a rate that was set by Lee and that was considered to be below market value. According to the referee, the fair market value of the unit was \$1,350 per month, \$250 more than the amount charged to Jeannine. However, the referee concluded the net rent charged for the

⁶ We have not located in the record an independent verification of either the amount of the 1999 appraisal or the 2003 sales price.

Clarice duplex was correct, since the rent on the 2108 Clarice unit had been raised to \$2,500 a month, \$500 more than the fair market rent.

Ronald argues that the extra income from the 2108 Clarice unit should not be used to offset the low rent charged on 2106 Clarice, contending that they should be treated instead as separate trust assets and that, in any case, 2108 Clarice did not generate rental income for significant portions of the trust period. According to Ronald, the below-market rent constituted a distribution to Jeannine that violated the trust agreement's provision that distributions among the beneficiaries be proportionate.

In our view, the record supports the trial court's conclusion that the net rent charged for the Clarice property was correct. Although there were two units, the duplex appears to be a single property, and Ronald has pointed us to no authority holding that the court could not base its decision on the net rental produced by the property.⁷ Indeed, as noted above, individual investments should not be viewed in isolation, but in the context of the trust portfolio as a whole. (§ 16047, subd. (b).) Likewise, we reject Ronald's contention that Maureen violated her duty of impartiality. Although the tenant was one of the beneficiaries of the trust, the rent was set by Lee before her death, and we see no impropriety in Maureen's decision to continue charging the same amount to an established tenant. Finally, we are not persuaded that by continuing the rent charged by her mother, Maureen effectively made a distribution to Jeannine of the difference between the actual rent and the market rent on the unit.

⁷ Ronald suggests that the high rent charged for 2108 Clarice resulted in excessive tenant turnover, failure of the tenant to pay rent, and legal expenses to evict the tenant. Nothing in the record explains the reason for the period during which no rents were collected on the 2108 Clarice unit, and we decline to speculate. We note, however, that the record indicates the unit ultimately produced \$2,500 a month in income.

C. Clarice Property Distribution

When Maureen distributed the Clarice property to herself and Jeannine, she valued it at \$775,000.⁸ As noted above, the trust agreement authorized distributions in kind, and provided the distributions “need not be pro rata among similar interests, so long as the totals [were] proportionate.” Ronald contends Maureen violated her duties of loyalty and impartiality by failing to distribute the property at the highest price in its range of value.

A real estate agent valued the property in October 2001 at \$750,000 to \$800,000, basing her opinion on recent sales prices of similar units and the fact that rents in the area were coming down. After reviewing an earlier appraisal and additional sales data, the probate referee also concluded the fair market value of the property as of November 2002 was \$750,000 to \$800,000. The trial court accepted this valuation, and we conclude substantial evidence supports the trial court’s finding.⁹

However, according to Ronald, Maureen was required to distribute the property at the highest amount in the range of value provided by her real estate agent, rather than in the middle of the range. He points out correctly that a trustee may not deal with trust property for his or her own profit. (§§ 16002, 16004.) This principle has been applied to distributions of trust assets. (See *Valentine v. Read* (1996) 50 Cal.App.4th 787, 794.) A transaction between the trustee and a beneficiary “by which the trustee obtains an advantage from the beneficiary is presumed to be a violation of the trustee’s fiduciary duties. This presumption is a presumption affecting the burden of proof.” (§ 16004, subd. (c).)

⁸ The record indicates that the Clarice property was distributed, and it includes documents Maureen’s attorney sent to Ronald’s counsel indicating she intended to distribute the Clarice property to herself and Jeannine. The parties do not dispute that the Clarice property was distributed to Maureen and Jeannine at a value of \$775,000, and we proceed on the assumption that this is so.

⁹ Ronald also points out that his own expert valued the property at \$865,000. However, substantial evidence supports the trial court’s factual finding, and we will not disturb it. (See *Estate of Beard, supra*, 71 Cal.App.4th at pp. 778-779.)

We see no evidence that Maureen obtained an advantage over the other beneficiaries. Before distributing the Clarice property, she obtained an opinion that it was worth \$750,000 to \$800,000. After investigating the real estate market, the probate referee reached the same conclusion about the value of the property at the time of the distribution. In the distribution, Maureen assigned the property a value at the mid-point of the range. In a real estate market that the record indicates was fluctuating and even declining at the time of the distribution, we see nothing improper either in estimating the property's worth using a range, or in choosing the mid-point as the value of the property.

D. Attorney Fees

Ronald contends his actions in filing to petition for an accounting and objecting to the first account benefited the trust and that, as a result, the trust should pay his attorney fees and costs. Orders denying or granting an award of attorney fees are generally reviewed for abuse of discretion. (*Walker v. Countrywide Home Loans, Inc.* (2002) 98 Cal.App.4th 1158, 1169.) However, the question of whether the criteria for an award of attorney fees have been met is one of law. (*Ibid.*)

One of the exceptions to the general rule that parties bear their own attorney fees is the common fund doctrine, under which “ ‘one who expends attorneys’ fees in winning a suit which creates a fund from which others derive benefits, may require those passive beneficiaries to bear a fair share of the litigation costs.’ ” (*Serrano v. Priest* (1977) 20 Cal.3d 25, 35; see also *Copley v. Copley* (1981) 126 Cal.App.3d 248, 293 [applying common fund doctrine to award attorney fees to trust beneficiaries where their actions resulted in recovery that benefited other beneficiaries].) The doctrine has been “extended to an action where no fund was created but the party sharing in the attorney fee expense was benefited by the litigation.” (*City and County of San Francisco v. Sweet* (1995) 12 Cal.4th 105, 110.) Thus, fees may be awarded “when the litigant, proceeding in a representative capacity, obtains a decision resulting in the conferral of a ‘substantial benefit’ of a pecuniary or nonpecuniary nature.” (*Serrano v. Priest, supra*, 20 Cal.3d at p. 38; see also *Ciani v. San Diego Trust & Savings Bank* (1994) 25 Cal.App.4th 563, 578.) According to Ronald, his actions benefited the other beneficiaries because his

petition compelled Maureen to make an accounting, and because his objections to the accounting were supported by the evidence. Ronald also contends he is entitled to attorney fees pursuant to section 11003, subdivision (b), under which such fees may be awarded to a beneficiary who contests an account where the trustee opposed the contest without reasonable cause and in bad faith.

The trial court found there was no basis for an award of attorney fees to Ronald. As to Ronald's claim that Maureen only prepared the accounting in response to his filing of the petition, the record contains evidence that Maureen took steps to prepare an accounting after Ronald made his initial request, although the accounting was not ready within 60 days of the request, as contemplated by section 17200, subdivision (b)(7).¹⁰ Based on this evidence, the trial court could reasonably conclude that Maureen would have completed the accounting whether or not Ronald had filed his petition, and that Ronald did not confer a benefit on the other beneficiaries. The trial court's finding that Ronald was not entitled to attorney fees based on his petition was a reasonable exercise of the trial court's discretion.

Nor did the trial court err in denying attorney fees for Ronald's objections to the accounting. The trial court approved the accounting and overruled the objections. On appeal, Ronald has raised again his objections to the treatment of the Kenry Way and Clarice properties, and we have rejected his arguments. There is no basis for an award of attorney fees for Ronald's expenses in objecting to the accounting.¹¹

¹⁰ Ronald raises as a separate point the contention that Maureen failed to account to the beneficiaries in a timely manner. The only relief he appears to seek as a result of this failure is attorney fees, which we have concluded were properly denied.

¹¹ Ronald also contends the trial court abused its discretion by signing the order approving the accounting and overruling his objections on July 17, 2003, before Ronald had filed his July 22, 2003, opposition to Maureen's proposed form of order. Regardless of when the trial court originally signed the order, it did not file the order until August 7, 2003. We see no abuse of discretion.

III. DISPOSITION

The judgment is affirmed.

RIVERA, J.

We concur:

KAY, P.J.

SEPULVEDA, J.